Supreme Court, U.S.
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No. 02-

IN THE SUPREME COURT OF THE UNITED STATES

MR. DOUGLAS FORRESTER, ET AL.

Petitioners,

v.

NEW JERSEY DEMOCRATIC PARTY INC., ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the New Jersey Supreme Court erred in establishing new standards for the filling of vacancies that arise prior to the general election that conflict with legislative enactments and thereby violate Article I, Sec. IV, cl.1 of the United States Constitution, which provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"?

Whether a State Supreme Court may alter an election scheme developed by the state legislature where that scheme serves an important federal interest protected by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C.A. § 1973ff *et seq.*, which safeguards the rights of citizens overseas to cast an effective absentee ballot?

Whether the Due Process Clause of the United States Constitution prohibits the disenfranchisement of American military personnel and citizens by replacing candidates on the ballot after these citizens have already cast their vote?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the Supreme Court of New Jersey:

The New Jersey Democratic Party, Inc.; The New Jersey Democratic State Committee, And The Hon. Bonnie Watson Coleman, In Her Official Capacity As Chair Of The New Jersey Democratic Party and Of New Jersey Democratic State Committee; and John or Jane Doe, Yet To Be Selected Democratic Party Candidate For The Office Of United States Senator, State of New Jersey,
Plaintiffs

Hon David G. Samson, Attorney General, State of New Jersey in his official capacity; Hon. Regena Thomas, Secretary Of State Of The State of New Jersey in her official capacity; Hon. Ramon Delacruz, Director of New Jersey Division of Elections; Hon. Michael J. Garvin, Clerk, County of Atlantic, in his official capacity; Hon. Kathleen A. Donovan, Clerk, County of Bergen, in her official capacity; Hon. Philip E. Haines, Clerk, County of Burlington, in his official capacity; Hon. James Beach, Clerk of The County of Camden, in his official capacity; Hon. Angela F. Pulvino, Clerk, County of Cape May, in her official capacity; Hon. Gloria Noto, Clerk, County of Cumberland, in her official capacity; Hon. Patrick J. McNally, Clerk, County Of Essex, in his office capacity; Hon. James N. Hogan, Clerk, County of Gloucester, in his official capacity; Hon. Janet E. Haynes, Clerk, County of Hudson, in her official capacity; Hon. Dorothy K. Tirpok, Clerk, County of Hunterdon, in her official capacity; Hon. Catherine DiCostanzo, Clerk, County of Mercer, in her official capacity; Hon. Elaine M. Flynn, Clerk, County of Middlesex, in her official capacity; Hon. M. Claire French, Clerk, County of Monmouth, in her official capacity; Hon. Joan Bramhall, Clerk, County of Morris, in her official capacity; Hon. M. Dean Haines, Clerk, County of

Ocean, in his official capacity; Hon. Ronni D. Nochimson, Clerk, County of Passaic, in her official capacity; Hon. Gilda T. Gill, Clerk, County of Salem, in her official capacity; Hon. R. Peter Widin, Clerk County of Somerset, in his official capacity; Hon. Erma Gormley, Clerk, County of Sussex, in her official capacity; Hon. Joanne Rajoppi, Clerk, County of Union, in her official capacity; Hon. Terrance D. Lee, Clerk, County of Warren, in his office capacity; Mr. Douglas Forrester, Candidate For The United States Senate (Republican); Mr. Ted Glick, Candidate For The United States Senate (Green Party); Elizabeth Macron, Candidate for United States Senate (libertarian Party); Mr. Gregory Pason (Socialist Party); and Mr. Norman E. Wahner (New Jersey Conservative Party).
Defendants

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of New Jersey. The decision below purports to order a change in the ballot for the office of United States Senate to replace the candidate of the Democratic Party for the general election scheduled to occur on November 5, 2002, notwithstanding the fact that a state statute unambiguously requires any candidate substitution to occur no less that forty-eight (48) days before an election, a deadline which has long since past. By so holding, the court below has usurped the power of the state legislature to proscribe the time, place, and manner of elections, in violation of Art. I, Sec. 4 of the United States Constitution and the Due Process Clause.

Moreover, thousands ballots have already been requested, and many of those have already been returned. The decision below therefore effects a retroactive change to the ballot for many overseas voters, and abbreviates the time available to the state to mail out such ballots. Because New Jersey is not currently mailing out absentee ballots, and because it is unclear when new ballots will be available to be mailed, the decision below is preventing New Jersey from fulfilling its requirements under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §1973ff *et seq*. Federal district courts have held that in order to comply with this Act, absentee ballots must be mailed out no later than thirty-five days before an election, a date that has now passed. Resolution of these issues by this Court is essential (1) to ensure the uniform and orderly conduct of elections in the many states on November 5, 2002, and beyond, (2) to prevent the disenfranchisement of numerous United States citizens living abroad and serving in the Armed Services, thousands of whom have already requested ballots and many of whom have already cast their votes, and (3) to discourage the increasing trend of judicial usurpation of

powers to regulate the time, place, and manner of elections that is properly vested in the legislature under the United States Constitution.

OPINION BELOW

The order of the Supreme Court of New Jersey (Petn. App. 1a) has not yet been reported. There is no other opinion in the case.

JURISDICTION

The order of the New Jersey Supreme Court granting plaintiffs' application for substitution of the name Frank Lautenberg for Sen. Robert Torricelli was entered on October 2, 2002. *See* Petn. App. 1a. Consequently, this petition is timely filed under Supreme Court Rule 13(1). This Court has jurisdiction over that judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const. Art. I § 4, cl. 1, states:

Congressional Elections; Time, Place, and Manner of Holding

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S.C.A. Const. Amend. XIV, Section 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As has been widely reported in the media, after securing his party's nomination through a direct primary election, on September 30, 2002, the Hon. Robert G. Torricelli, United States Senator from the State of New Jersey, announced his intent to withdraw as a candidate of the Democratic Party for the office of United States Senator for the general election scheduled to occur on November 5, 2002. Senator Torricelli's stated reason for withdrawing was the fact that he did not want to be responsible for the Democratic loss of control of the Senate, having seen his poll numbers plummet in recent weeks following his admonishment by a Senate Ethics Committee.

Democratic Party leaders, aware that the plain text of the Jersey statute governing the filling of unexpected vacancies on the ballot unambiguously required that such vacancy "shall be made not later than the 48th day" before the general election, see N.J.S.A. 19:13-20(d), announced their intention to nonetheless proceed to select a new candidate to fill the "vacancy" created by Sen. Torricelli's announcement that he no longer wished to run for office. They also announced their intention to petition the state courts in order to have an exception made to that law. On October 1, 2002, the New Jersey State Democratic Party filed such a suit. On October 2, the Democratic party leaders in New Jersey met in private and conferred, eventually agreeing that the party would put forth former Senator Frank Lautenberg as a replacement candidate for the office of U.S. Senate. The

voters of New Jersey had no say in Senator Lautenberg's nomination.

On October 2, 2002, the New Jersey Supreme Court, notwithstanding the plain 48-day statutory deadline for the filling of a vacancy, authorized the party to fill the vacancy 33 days before the general election. By so usurping the power of the state legislature, the Supreme Court of New Jersey violated Art. I, Sec. 4 of the United States Constitution. In addition, by enjoining the mailing of absentee ballots while the litigation was pending, and ultimately by enjoining any mailing of absentee ballots until new ballots bearing the name Frank Lautenburg as the Democratic candidate for U.S. Senate can be printed while simultaneously voiding the ballots already requested (and in some cases cast) by overseas citizens, the Court placed the state of New Jersey in violation of its requirements to provide sufficient time for the casting of such ballots under the Uniformed and Overseas Citizens Absentee Voting Act. Because the actions of the Supreme Court of New Jersey retroactively change the law passed by the legislature, and because it threatens to disenfranchise thousands of overseas voters, this Court should grant certiorari and reverse the decision of the Supreme Court of New Jersey.

PROCEEDINGS BELOW

On October 1, 2002, the New Jersey State Democratic Party and related entities filed suit in the Superior Court, Law Division, Middlesex County, against the New Jersey State Attorney General, Secretary of State, the Director of the Division of Elections, and each and every county clerk for the twenty-one counties of the State of New Jersey, and all other candidates for office of U.S. Senator, seeking injunctive relief against the printing and mailing of ballots, declaratory relief that they had the authority to select a duly qualified candidate to fill the "vacancy" created by the

withdrawal of the Hon. Robert G. Torricelli, and directing that the name of Senator Torricelli be replaced by said candidate on ballots for the November 5, 2002, general election. At the same time, they filed a motion to certify the action directly to the New Jersey Supreme Court, which was granted. On October 2, 2002, the Supreme Court of New Jersey entered an order directing that new ballots be printed reflecting a change in the candidate of the Democratic party candidate from Sen. Torricelli to Frank Lautenberg. On October 3, 2002, Petitioner filed an Emergency Application to Justice Souter, as Single Circuit Justice for the Third Circuit, for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of New Jersey. At the time of this filing, that application is still pending.

REASONS FOR GRANTING THE WRIT

At the time of this filing, more than 18,000 (eighteen thousand) absentee ballots have already been requested and have been authorized to be mailed. Sixteen hundred (1,600) absentee ballots have been mailed already, and 106 military ballots have been mailed already. An unknown number of these citizens of New Jersey citizens have already cast their absentee ballots for the November 5, 2002, general election, yet the New Jersey Supreme Court has ignored the plain text of its state's own duly-enacted statute and ordered the ballot to be altered less than thirty-three days before the general election. New Jersey is, of course, generally entitled to conduct its elections in the manner it sees fit, and ignore the plain text of its own laws if it so chooses, but here the New Jersey Supreme Court's decision to change the legislatively-proscribed rules of the game, inuring to the benefit of one political party, directly contravenes the role given to the state legislature by the United States Constitution, and risks disenfranchising New Jersey citizens living abroad in contravention of federal law.

This Court has twice granted certiorari in very similar cases arising out of election disputes in Florida. In both *Bush* v. *Gore*, 531 U.S. 98 (2000), and *Bush* v. *Palm Beach County*, 531 U.S. 70 (2000), this Court was confronted with the situation of a State Supreme Court re-writing an express statutory scheme under the auspices of judicial interpretation of ambiguous text. Because the United States Constitution expressly granted authority to the state legislature to determine the manner of choosing presidential electors, in *Bush* v. *Palm Beach County*, this Court unanimously vacated the unanimous decision of the Florida Supreme Court and remanded the case for consideration of the federal power vested in the legislature. A similar result should obtain in this case, because, in patently ignoring the plain text of state law and allowing "liberal construction" that replaced the plain 48 day requirement with a 33 day requirement, the New Jersey Supreme Court has failed to pay heed to the Federal Constitutional provisions that vest power for determining the manner of choosing Senators with the state legislature. Indeed, the order below is bereft of any discussion of the Federal Constitution, or of the role of the state legislature in determining the "manner" of elections for U.S. Senate. Furthermore, this very state scheme developed by the legislature serves a clear purpose in fulfilling the State of New Jersey's requirements under federal law to provide an adequate period of time for the printing and mailing of overseas ballots. Allowing the legislature's determination to be amended by judicial fiat in this case risks disenfranchising the state's absentee voters, in contravention of the legislature's clear intent in providing for the noticing and distribution of absentee ballots fifty days before an election. *See* N.J.S.A. 19:57-7 (notice to person desiring absentee ballots "shall be separately published prior to the 50th day immediately preceding the holding of any election."). For these reasons, this Court should grant certiorari and reverse the decision of the Court below.

I. By amending the unambiguous statutory text of a law past by the legislature governing the manner of electing U.S. Senators, the New Jersey Supreme Court has usurped power that the United States Constitution vests exclusively in the hands of the New Jersey legislature.

The Constitution expressly states that "[t]he times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof." U.S. Const. art. I, § IV, cl. 1.[1] Thus, as with the grant of authority for selecting presidential electors under Article II, §1, the Constitution "leaves it to the legislature *exclusively* to define the method" of electing Senators. *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, the Framers' choice of those words in Article I – the "manner of holding election for Senators . . . shall be prescribed . . . by the legislature" plainly "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Palm Beach*, 531 U.S. at 76 (*quoting McPherson*, 146 U.S. at 25).

The New Jersey Legislature enacted a carefully crafted statutory scheme to govern the manner in which the parties may nominate candidates for the ballot, and that scheme may not be overridden by state courts. By creating a scheme by which parties could nominate and replace candidates for U.S. Senate, "the legislature [was] not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under . . . the United States Constitution." *Palm Beach*, 531 U.S. at 76 (2000). Consequently, the "general rule," under which "this Court defers to a state court's interpretation of a state

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[1] The manner in which parties may place candidates for Senate on the ballot is obviously a "manner" of holding an election.

statute," is inapposite. *See Bush* v. *Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring) (While "[i]n most cases, comity and respect for federalism compel [the Supreme Court] to defer to the decisions of state courts on issues of state law," in a few cases, in which the United States Constitution imposes a duty on a particular branch of a State's government, "text of an election law itself, and not just its interpretation by the courts of the States, takes on independent significance."). The Supreme Court of New Jersey plainly re-wrote the statutory scheme, and thus substituted its judgment for that of the legislature in violation of Article I. Such a usurpation of the legislature's constitutionally-delegated power defies the Constitution's plain language. The New Jersey Legislature never authorized judicial revision of the legislative structure it so meticulously conceived.

With respect to Article II, §1, cl.2, governing Presidential electors, this Court has recognized that the legislature's powers granted by the Constitution are exclusive. *See McPherson*, 146 U.S. at 34-35 ("'The appointment of these electors is thus placed absolutely and wholly within the legislatures of the several states.'") (quoting with approval S. Rep., 1st Sess., 43rd Cong., No. 395). Since Art. I, § IV, cl.1. equally plainly vests authority over senatorial election with the "legislature," the same exclusive legislative authority obtains here. Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g.*, U.S. Const. art. I, § 8, cl.16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g.*, U.S. Const. art. I, §2, cl.4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Framers' decision to vest specific authority in the state legislatures must be understood to be exclusive of state executive or judicial power to proscribe the

"manner" of electing Senators. Thus, in the absence of a clear and express delegation of the manner of regulating election of Senators to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

Much like the judicial re-write of the Florida election scheme at issue in *Bush* v. *Gore*, the state court's key conclusions were simply pronounced without even the pretense of any statutory support. In N.J.S.A. 19:13-20, the New Jersey Legislature prescribed a detailed procedure for filling vacancies on ballots for general, state-wide elections. The statute provides that "[i]n the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election," a substitute candidate "shall be selected" according to a procedure set forth in the statute. N.J.S.A. 19:13-20a-c. The statute further provides that:

> [a] selection [to fill a vacancy] made pursuant to this section shall be made not later than the 48th day preceding the date of the general election, and a statement of such selection shall be filed with the Secretary of State or the appropriate county clerk . . . not later than said 48th day . . . "

Id., 19:13-20d (emphasis added). As with the vacancy-selection procedure, the New Jersey Legislature set forth detailed requirements for the manner in which a selection is made and the contents of the required statement filed with the Secretary of State or county clerk. *Id.*, 19:13-20d(1)-(3) & e. Yet both the requirement that a vacancy must occur by the 51st day before the election, and that a new candidate must be selected by the 48th day before the election, were simply disregarded by the Supreme Court of New Jersey. There is no ambiguity in the number 51 or the number 48 that requires

statutory construction of any sort, or that can be "liberally construed," in the interests of voters or otherwise, to yield a different number. Nor is there any ambiguity in the legislature's use of the word "shall," which is obviously mandatory.

The New Jersey Supreme Court ignored this simple result and unapologetically re-wrote the statute, under the principle that its election law should be "liberally construed." These expressions in the Court's opinion plainly demonstrate "that it construed [New Jersey] Election Code without regard to the extent to which the [New Jersey] Constitution could, consistent with Art. [I, Sec. IV], 'circumscribe the legislative power.'" *Palm Beach*, 531 U.S. at 76. Under such circumstances, it is appropriate for this Court to stay and vacate the opinion below.

The only authority cited by the New Jersey Supreme Court to support its holding were two prior decisions involving interpretations of statutory schemes for electing state or local officials, and which are thus inapposite. *See Catania* v. *Harbele*, 588 A.2d 374 (N.J. 1991); *Kilmurray* v. *Gilfert*, 91 A.2d 865 (N.J. 1952). Even assuming, by the passage of time, the judiciary could have usurped the legislature's role in regulating the manner of elections for Senate by repeatedly altering the statutory text of statutes affecting the manner of elections of Senators (almost as if by adverse possession), it has not done so. Until the New Jersey Supreme Court's decision in this case, New Jersey courts have *never* interpreted the 48-day time period for submitting a substitute candidate, prescribed in N.J.S.A. 19:13-20d, as discretionary.

Quite the opposite, the very cases relied upon by the New Jersey Supreme Court confirm that N.J.S.A. §19:13-20d is mandatory. In *Kilmurray v. Gilfert*, 91 A.2d 865 (N.J. 1952), the New Jersey Supreme Court held that the "obvious

purpose" of setting a deadline within which to fill a vacancy on a ballot advanced the important state interest of "afford[ing] the various election officials sufficient time in which to attend to the mechanics of preparing for the general election." *Id.* at 867. *Kilmurray* involved a state candidate who died 36 days prior to the general election. The version of 19:13-20 then in effect required that a vacancy that occurred 37 days prior to the general election "shall be" filled within 34 days of the general election. 91 A.2d at 866. The *Kilmurray* court allowed the vacancy to be filled "*so long as* [the county committee] makes and files its selection with the county clerk 34 days or more before the general election." *Id.* at 868 (emphasis added). Hence, although the party's statutorily-allotted time for selecting a new candidate under the statutory scheme could be abbreviated according to that decision, by allowing a "vacancy" to arise later than the 37th day, the time for the State to prepare a new ballot, protected by the 34 day deadline, could not be similarly abbreviated. In the instant case, even if the New Jersey Supreme Court could relax the 51-day requirement for the creation of a vacancy (as it purports to do), *precedent and statutory language prohibit it from altering the 48 day requirement for filling that vacancy*, which protects the state's right to ensure an orderly election by preparing ballots and mailing absentee ballots overseas.

By this discussion, Petitioner does not concede that even the 51-day deadline may be waived by a state court with respect to an election for federal office, because that deadline serves an important federal interest in permitting state citizens living abroad to vote in federal elections without the risk of disenfranchisement. It must be understood as going hand in hand with the state law which requires publication and notice of the ballot to absentee voters fifty days before the election, see N.J.S.A. 19:57-7, which ensures that the state is in compliance with its federal obligations for providing overseas citizens an adequate amount of time to

cast a ballot, as discussed more fully below. Petitioner is simply acknowledging that there is some prior precedent for state courts ignoring the deadlines relating to when a vacancy must arise, but they have never ignored the deadline with respect to when a new candidate must be selected.

Consequently, *Catania v. Haberle*, 588 A.2d 374 (N.J. 1991), must be understood as suggesting that the 48-day time period for submitting a candidate's name to the Secretary of State is also mandatory. *Id.* at 377-78. "Obviously," the court said, "there will be cases in which provisions must be interpreted *strictly, mandatorily*, for in some cases it will be apparent that that interpretation serves important state interest, including orderly electoral processes." *Id.* at 379 (emphasis added). Furthermore, both *Catania* and *Kilmurray* discuss how the 48-day time period prescribed for selecting a candidate to fill a vacancy advance the legislature's interest in (1) ensuring that election officials have sufficient time to prepare for an election, *Kilmurray*, 91 A.2d at 867, and (2) protecting the electorate's choice in the primary election "against political manipulation which deprive them of their chosen candidates . . . ." *Stevenson v. Gilfert*, 100 A.2d 490, 495 (N.J. 1953).

Unlike these decisions, which, while ignoring the statutory deadline by which a vacancy must arise, always maintained respect for the deadline by which a candidate to fill that vacancy must have been selected so that the State had sufficient time to prepare and mail absentee ballots,[2] the New Jersey Supreme Court's decision in this case completely foils the Legislature's carefully crafted electoral scheme. First, by

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[2] Thus, the New Jersey Supreme Court only amended deadlines that effectively shortened the period of time that a party had to select its candidate to fill any vacancy, which implicates no important interest on the part of the State legislature.

permitting the Democratic State Committee to select a candidate to replace Torricelli less than 48 days before the November 5, 2002 election, the court wrote the 48-day requirement out of 19:13-20d. Second, although 19:13-20d requires that the statement of a vacancy selection "*shall be filed* with the Secretary of State or the appropriate county clerk" according to specified procedures, N.J.S.A. 19:13-20d(1)-(3) & e, the New Jersey Supreme Court jettisoned these statutory requirements altogether. Instead, the court simply "ordered" that the "name of [the] candidate duly selected by the Democratic State Committee shall replace that of Robert G. Torricelli on the ballot." Order at 6. Third, the Court paid no heed to provisions of State law that required the noticing and publication of absentee ballots more than fifty days before an election, in order to ensure that overseas voters are not disenfranchised. *See* N.J.S.A. 19:57-7. The Court itself has acknowledged, in the very opinion on which it relies, that "it would be most unusual for the Legislature to want to change the rules in the middle of the game," yet that is precisely the action the court took upon itself to do in this case. *Catania*, 588 A.2d at 376.

Where the Framers have invested control over the statutory scheme in the New Jersey legislature, the New Jersey Supreme Court is not free to disregard the plain text of the statute with mere platitudes that the statutory scheme should be "liberally construed 'to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly, to allow the voters a choice on election day.'" *New Jersey Democratic Party, Inc.* v. *Samson*, Attachment A, at *5 (*quoting Catania*, 123 N.J. at 448). Such a decision is clearly contrary to *Palm Beach County*, in which this Court unanimously held that such statements are inconsistent with the exclusive authority vested in the state legislatures by the Constitution to

determine the manner of the conduct of elections for federal office. *See* 531 U.S. at 77.

In any event, such platitudes are misplaced in this case. It is not the *State* that has deprived the voters of a choice on election day, but rather the Democratic Party. In asking to remove the name of its chosen candidate a few short weeks before the election (motivated solely by a fear of losing on election day), the Democratic Party took away the voters' clear choice, as demonstrated by their votes for Sen. Torricelli in the Democratic primary. The party deliberately and knowingly left itself with insufficient time under the statutory structure to replace Sen. Torricelli with another candidate on the ballot. Thus, even assuming that a vacancy resulting from the death or similar unforeseen external circumstance could justify amending the legislature's 48-day deadline, there is nothing in either law or policy authorizing the judicial revision here. A party's deliberate creation of a "vacancy" after the statutory deadline for partisan advantage provides no compelling basis for amending that deadline for the protection of the voters. Indeed, should their tactic succeed, political parties will only be encouraged to replace candidates that have been chosen by the voters with candidates that the party believes have a better chance of winning as election day approaches.

II. The Decision of the New Jersey Supreme Court also Usurps the Authority of the State Legislature to Enact and Election Scheme to Fulfill the State's Obligations under the Uniform and Overseas Citizens Voting Rights Act.

New Jersey law governing the replacement of candidates should vacancies arise more than fifty-one days before and election should be understood part and parcel with its law providing for the notice and publication of absentee ballots fifty days before an election. *See* N.J.S.A. 19:57-7.

Obviously, absentee ballots cannot be published and distributed fifty days before an election if a candidate is replaced after that time. This fifty day requirement represents the legislature's determination that a given amount of time is necessary for the distribution of military ballots overseas. This determination serves an important state interest in complying with federal law. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA or "the Act"), 42 U.S.C. §1973ff *et seq.*, guarantees American citizens living abroad the right to cast an effective ballot, and prevents states from failing to provide adequate time for ballot materials to be sent to voters. *See, e.g.*, H.R. Rep. No. 99-765, at 10-13; 1986 U.S.C.C.A.N. at 2014-17. The Act provides for enforcement of its provisions by the Attorney General, *see* 42 U.S.C. §1973dd Sec. 3, and also provides penalties for anyone who "knowingly deprives or attempt to deprive any person of a right" under the Act. 18 U.S.C. § 608. Federal courts have interpreted the Act as requiring the States to begin to mail out absentee ballots no less than thirty-five days before an election – a deadline that passed for New Jersey three days ago.[3]

In 1980, when the State of Florida had in place state procedures which allowed counties to wait until twenty days before the general election to begin mailing ballots overseas, the Federal Government sued the State under the Act, claiming that thousands of service personnel had been effectively disenfranchised. Pursuant to a consent decree, Florida agreed to change procedures and begin to mail ballots 35 days before elections. *United States* v. *Florida*, No. TCA-

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[3] In a series of lawsuits, the Department of Justice has brought suit against states that had statutes, regulations, or practices providing for the distribution of ballots beginning less than thirty-five days before the general election, in order to enforce the rights of military and overseas personnel to cast an effective absentee ballot.

80-1055 (N.D. Fla. 1982); *see also Harris* v. *Florida Elections Canvassing Commission*, 122 F. Supp.2d 1317 (N.D. Florida 2000) (discussing the earlier lawsuit). An attempt to shorten this thirty-five day time frame, even by a mere five days (to thirty days prior to the election), was rejected by the federal court in that case. *Id.* at 1321. The court rejected any shortening of the thirty-five day time frame notwithstanding the Florida state legislature's finding that "the thirty-five-day deadline would 'place the first primary in July when a large majority of Florida citizens are away on vacation,' thus 'disenfranchis[ing] many more voters than the few overseas who may not return their ballots in time to be counted.'" *Id.*

During the course of the 2000 Presidential election recount, federal courts made clear that the UOCAVA's requirement that a state send out its absentee ballots in time for men and women overseas to cast an effective vote trumps any conflicting state law or regulations concerning absentee ballots. *See Bush* v. *Hillsborough County Canvassing Board*, 123 F. Supp.2d 1305 (N.D. Florida 2000). As the *Hillsborough County* Court explained, "[t]he overall theme of the OCVRA, like the FVAA, was to reenfranchise citizens residing overseas through the adoption, by the several States, of uniform and simplified absentee voting registration procedures." *Id.* at 1309. By its ignoring the state legislature's carefully enacted scheme for ensuring that its absentee ballots would be mailed in compliance with federal law, the Supreme Court of New Jersey has led the state down a path of ignoring the uniform procedures that the United States Congress established in the UOCAVA, to the detriment of the constitutional rights of all American citizens living abroad.

III. The Decision Below Violates the Due Process Clause of the United States Constitution.

The New Jersey Supreme Court's decision to change the rules of the game for the election after certain absentee ballots had been cast violates the Due Process Clause. As discussed above, the New Jersey Supreme Court has deviated substantially from the rules that were in place when this election "began" fifteen days ago and absentee ballots were sent out under state law. An unknown number of these ballots have been filled out and returned by voters. Because the contest is not being determined by rules that were in place when these absentee votes were cast, the New Jersey State Supreme Court decision violates Due Process.

In this sense, the case is analogous to *Roe* v. *Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995), in which voters brought suit challenging a state court decision to allow improperly cast absentee ballots to be counted. In that case, prior to the election, a uniform state rule existed that absentee ballots would not be counted "unless either notarized or signed by two witnesses." *Id.* at 580. Because a state circuit court ruling would have required election officials to count the disputed ballots, the ruling, "if permitted to stand, w[ould] constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581. Consequently, the Court determined that "failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama" and that a "change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement." *Id.*

So too here, the New Jersey Supreme Court's amendment of the election law statute is a post-election departure from the rules in place on the day when absentee

ballots began to be cast. The harm caused to voters is even more cognizable than that at issue in *Roe* – those voters who have already cast their ballots in compliance with the rules that were in place prior to the New Jersey Supreme Court's decision have had their votes invalidated, and there is no guarantee that they will be able to receive and cast further absentee ballots in this election. Many of these citizens may not go to the trouble of securing a new absentee ballot and casting their ballot a second time. Immediate attention from this Court is required to protect the rights of these voters.

IV. Prompt Action from this Court is Required to Prevent Irreparable Harm to Mr. Forrester, the Voters of New Jersey, and the Electoral Process as a Whole.

Absent immediate action from this Court, Mr. Forrester himself will suffer irreparable injury. The New Jersey primary took place on June 4. The incumbent asked to remove his name as a candidate on September 30. The Forrester-Torricelli contest therefore lasted for 4 of the final 5 months of this electoral cycle. During the course of the 4 month period, both candidates engaged in an aggressive contest during which both absorbed heavy political blows. In Forrester's case, he was the target of literally millions of dollars of paid negative advertising; the Dem. Sen. Campaign Committee has spent between 4.5 and 5 million dollars in this campaign against Forrester the race started. This sum of money has obviously harmed Mr. Forrester's campaign. Mr. Forrester, on the other hand, spent significant sums of money bringing Sen. Torricelli's record before the voters. This time and money is now wasted just as clearly as if it had been placed in a fire

With 4 of the 5 months completed, somewhat akin to a boxing match in the 8th

round of a 10 round fight, the New Jersey Supreme Court has amended the state's election laws to allow a new candidate - or a new boxer – to enter the fray. That candidate has not inherited the burden or impact of the vast majority of the campaigning that Mr. Forrester and his allies have done in the last four months against Sen. Torricelli. In fact, that candidate starts literally fresh. In contrast, all of the blows that were directed by Sen. Torricelli and his allies at Mr. Forrester are still relevant to this contest. Forrester's reputation in the state remains very much influenced by the expenditures that were directed his way during these past 4 months. Obviously, the same is not true for Mr. Lautenberg. A rested replacement boxer who comes into the fight at the end of the contest is neither weary, hurt, winded nor stressed. Allowing such a fighter to come in at the eleventh hour to attempt to give a final knockout blow causes irreparable harm to Mr. Forrester, since inherently serves to tip the scales, to one degree or another, in favor of Mr. Lautenberg.

The decision below also threatens harm to the voters of New Jersey and the political process as a whole. "States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983). In this particular case, a last minute change to the ballot threatens to disenfranchise overseas voters, impacting Mr. Forrester's right to associate with those voters. Numerous ballots have already been sent overseas, and an unknown number of those ballots have been returned. Absent an action from this Court, those voters risk effective disenfranchisement, since voters on November 5, 2002, will be faced with different choices on the ballot than those they were afforded. While New Jersey may attempt to locate

many of these individuals and send them new ballots, in times of war, when military personnel overseas are on ships or in remote locations, many of these attempts will obviously fail and these voters will be disenfranchised. It was this very concern that led Congress to pass the UOCVRA, and an analogous concern that led the New Jersey legislature to require vacancies to be filled forty-eight days prior to the general election. The will of the federal government and of the state legislature must trump the policy choice of the Supreme Court of New Jersey in this instance.

Further irreparable injury that is being caused from the fact that the New Jersey Supreme Court's decision has created a dual system of ballots, with those printed and cast prior to its decision apparently being null and void. If applicants are correct regarding the existence of a constitutional violation, in a short period of time, it will be too late to correct the harm caused by that violation, as a second set of ballots will have been printed (at great expense), and many of them mailed overseas. Should a violation be found on the eve of election, ordering the printing of a third set of ballots will be impossible, and many more absentee voters may be disenfranchised. The decision below has injected considerable uncertainty and chaos into the November 5, 2002, general election – uncertainty as to whether new ballots will be printed and mailed in time, uncertainty as to whether individuals who have already voted will receive new ballots, and uncertainty as to who the final candidate of the Democratic party will be. Absent immediate action from this Court, the electoral process in New Jersey may be thrown into disarray.

The decision of the Supreme Court of New Jersey opens the doors of American elections to considerable mischief. If such tactics are allowed to stand, voters in every election will face uncertainty, as candidates who appear to be losing drop out of the race on the eve of the election, and are

replaced by individuals who have not undergone the rigors of the nomination process. In this case, the Democratic nominee who was selected by the voters of New Jersey in the Democratic primary has been replaced by a candidate hand-picked by the party leaders. Thus, the deliberately dilatory selection of a different candidate cannot be said to have protected the rights of the voters of New Jersey to choose the candidate of their choice on election day. That choice was taken away from them by Sen. Torricelli and the Democratic party, and the New Jersey Supreme Court has amended the law to endorse their partisan manipulation. In this sense, the decision below threatens to change the face of American politics. Candidates who undergo bruising primaries may be replaced at leisure by party bosses with candidates about whom the public knows little. The voters, absentee or otherwise, will be the ones to suffer.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of New Jersey.

Respectfully submitted,

DAVID A. NORCROSS
BLANK ROME COMISKY
MCCAULEY
200 WEST STATE STREET
TRENTON, NEW JERSEY 08608

APPENDIX

SUPREME COURT OF NEW JERSEY
A-24 September Term 2002
53,618

THE NEW JERSEY DEMOCRATIC PARTY, INC.; THE NEW JERSEY DEMOCRATIC STATE COMMITTEE, AND THE HON. BONNIE WATSON COLEMAN, IN HER OFFICIAL CAPACITY AS CHAIR OF THE NEW JERSEY DEMOCRATIC PARTY AND OF NEW JERSEY DEMOCRATIC STATE COMMITTEE; AND JOHN OR JANE DOE, YET TO BE SELECTED DEMOCRATIC PARTY CANDIDATE FOR THE OFFICE OF UNITED STATES SENATOR, STATE OF NEW JERSEY,

Plaintiffs-Movants

v.

HON DAVID G. SAMSON, ATTORNEY GENERAL, STATE OF NEW JERSEY IN HIS OFFICIAL CAPACITY; HON. REGENA THOMAS, SECRETARY OF STATE OF

ORDER

THE STATE OF NEW JERSEY IN HER OFFICIAL CAPACITY; HON. RAMON DELACRUZ, DIRECTOR OF NEW JERSEY DIVISION OF ELECTIONS; HON. MICHAEL J. GARVIN, CLERK, COUNTY OF ATLANTIC, IN HIS OFFICIAL CAPACITY; HON. KATHLEEN A. DONOVAN, CLERK, COUNTY OF BERGEN, IN HER OFFICIAL CAPACITY; HON. PHILIP E. HAINES, CLERK, COUNTY OF BURLINGTON, IN HIS OFFICIAL CAPACITY; HON. JAMES BEACH, CLERK OF THE COUNTY OF CAMDEN, IN HIS OFFICIAL CAPACITY; HON. ANGELA F. PULVINO, CLERK, COUNTY OF CAPE MAY, IN HER OFFICIAL CAPACITY; HON. GLORIA NOTO, CLERK, COUNTY OF CUMBERLAND, IN HER OFFICIAL CAPACITY; HON. PATRICK J. MCNALLY, CLERK, COUNTY OF ESSEX, IN HIS OFFICE CAPACITY; HON. JAMES N. HOGAN, CLERK, COUNTY OF GLOUCESTER, IN HIS OFFICIAL CAPACITY; HON. JANET E. HAYNES, CLERK,

COUNTY OF HUDSON, IN HER OFFICIAL CAPACITY; HON. DOROTHY K. TIRPOK, CLERK, COUNTY OF HUNTERDON, IN HER OFFICIAL CAPACITY; HON. CATHERINE DICOSTANZO, CLERK, COUNTY OF MERCER, IN HER OFFICIAL CAPACITY; HON. ELAINE M. FLYNN, CLERK, COUNTY OF MIDDLESEX, IN HER OFFICIAL CAPACITY; HON. M. CLAIRE FRENCH, CLERK, COUNTY OF MONMOUTH, IN HER OFFICIAL CAPACITY; HON. JOAN BRAMHALL, CLERK, COUNTY OF MORRIS, IN HER OFFICIAL CAPACITY; HON. M. DEAN HAINES, CLERK, COUNTY OF OCEAN, IN HIS OFFICIAL CAPACITY; HON. RONNI D. NOCHIMSON, CLERK, COUNTY OF PASSAIC, IN HER OFFICIAL CAPACITY; HON. GILDA T. GILL, CLERK, COUNTY OF SALEM, IN HER OFFICIAL CAPACITY; HON. R. PETER WIDIN, CLERK COUNTY OF SOMERSET, IN HIS OFFICIAL CAPACITY; HON. ERMA GORMLEY, CLERK,

COUNTY OF SUSSEX, IN HER OFFICIAL CAPACITY; HON. JOANNE RAJOPPI, CLERK, COUNTY OF UNION, IN HER OFFICIAL CAPACITY; HON. TERRANCE D. LEE, CLERK, COUNTY OF WARREN, IN HIS OFFICE CAPACITY; MR. DOUGLAS FORRESTER, CANDIDATE FOR THE UNITED STATES SENATE (REPUBLICAN); MR. TED GLICK, CANDIDATE FOR THE UNITED STATES SENATE (GREEN PARTY); ELIZABETH MACRON, CANDIDATE FOR UNITED STATES SENATE (LIBERTARIAN PARTY); MR. GREGORY PASON (SOCIALIST PARTY); AND MR. NORMAN E. WAHNER (NEW JERSEY CONSERVATIVE PARTY).

Defendants-Respondents.

This matter having been initiated by plaintiffs filing a verified complaint and order to show cause in the Superior Court, Law Division, Middlesex County, on September 30, 2002, which complaint sought the following relief.

1. An injunction prohibiting the inclusion on the general election ballot of November 5, 2002, of the name of Robert G. Torricelli as a Democratic Party candidate for the office of United States Senator;

2. A declaration that the New Jersey Democratic State Committee may forthwith proceed to select a duly qualified candidate to fill the vacancy created by the withdrawal of Robert G. Torricelli;

3. The removal of the name of Robert G. Torricelli from the general election ballot and its replacement with the name of the candidate selected by the New Jersey Democratic State Committee;

4. The printing of the general election ballots with the substitution of the new candidate's name for that of Robert G. Torricelli;

5. A direction of defendant County Clerks that the substitution of the new candidate's name for that of Robert G. Torricelli is to be made on all ballots, whether absentee, military, provisional, emergency, voting machine, ballot card, or otherwise; and

6. A direction to defendant County Clerks that all general election ballots are to be printed with the name of the new candidate selected by the Democratic State Committee;

And Plaintiffs having contemporaneously filed a motion with the Court seeking the direct certification of the matter;

And the Superior Court, Law Division, Middlesex County, having issued an Order to Show Cause on October 1, 2002, that, inter alia, enjoined the printing of all ballots for the general election;

And the Court having determined on October 1, 2002, that it should certify the matter directly and conduct oral arguments on October 2, 2002;

And the Court having also continued the stay of the printing of ballots pending its further Order;

And the Court having considered the record before it, having reviewed the submissions of the parties, and having heard the argument of counsel;

And the Court having concluded that the central question before it is whether the dual interests of full voter choice and the orderly administration of an election can be effectuated if the relief requested by plaintiffs were to be granted;

And the Court being of the view that

> [it] is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all

> other qualifying parties and groups.

Kilmurray v. Gilfert, 10 N.J. 435, 441 (1952);

And the Court remaining of the view that the election statutes should be liberally construed

> to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly, to allow the voters a choice on Election Day.

Cantania v. Haberle, 123 N.J. 438, 448;

And the Court having determined that N.J.S.A. 19:13-20 does not preclude the possibility of a vacancy occurring within fifty-one days of the general election;

And the Court having concluded that the equitable relief sought herein is not inconsistent with the precedent of this Court and the terms of the statute and that the Court should invoke its equitable powers in favor of a full and fair ballot choice for the voters of New Jersey;

And the Court having determined that the interests of justice require the immediate issuance of an Order disposition with the court's opinion to follow in due course;

And good cause appearing;

IT IS ORDERED that plaintiffs' application for the removal from the ballot for the general election of November

5, 2002, of the name of Robert G. Torricelli as a candidate for the position of United States Senator is granted; and it is further

ORDERED that the name of candidate duly selected by the Democratic State Committee shall replace that of Robert G. Torricelli on the ballot; and it is further

ORDERED that the preparation of revised ballots by the County Clerks shall proceed forthwith under the direction of the Attorney General of New Jersey and the supervision of Superior Court Judge Linda R. Feinberg, A.J.S.C. (Mercer County) who is empowered by this Order to exercise statewide jurisdiction over this process; and it is further

ORDERED that the parties shall meet with Judge Feinberg on Thursday, October 3, 2002, at 11:00 a.m. in the Mercer County Civil Courthouse, Trenton, to expedite the implementation of this Order; and it is further

ORDERED that military and overseas ballots shall be given precedence in preparation and mailing; and it is further

ORDERED that all of the costs related to the preparation and, when necessary, the mailing of revised ballots that are the subject of this Order shall be borne by plaintiffs and paid under the supervision of Judge Feinberg; and it is further

ORDERED that the plaintiffs shall deposit into the Superior Court Trust Fund $800,000, or such other sum as Judge Feinberg may find to be necessary and appropriate to meet the costs of implementing this Order, said deposit to be made in full or in such installments as Judge Feinberg shall determine, beginning no later than Friday, October 4, 2002; and it is further

ORDRED that the Attorney General of New Jersey shall oversee the election activities described in the preceding paragraphs pursuant to his authority as the chief election official of the Sate of New Jersey, and he shall report to Judge Feinberg on his activities in that capacity pursuant to this Order; and it is further

ORDERED that the Attorney General shall take all steps necessary to avoid voter confusion, including, but not limited to, the preparation of an explanatory letter to all voters to whom a revised ballot has been sent; and it is further

ORDRED that the schedule for the mailing of revised ballots provided for by this Order shall be set by Judge Feinberg in a manner that assures that ballots can be completed and return in time for the November 5, 2002, general election.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 2nd day of October, 2002.

Clerk of the Supreme Court,
/s/Stephen W. Townsend. Esq.

Chief Justice Poritz and Justice Coleman, Long, Verniero, LaVecchia, Zazzali, and Albin join in the Court's Order.